

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C.

JAN 22 1998

Federal Communications Office of Secretary

In the Matter of

The Cheyenne River Sioux Tribe Telephone Authority's and U S WEST COMMUNICATIONS, INC.'s Joint Petition for Expedited Ruling Preempting South Dakota Law

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Telephone Authority's and)
U S WEST COMMUNICATIONS,)
INC.'s Joint Petition for Expedited)
Ruling Preempting South Dakota Law)

**THE CHEYENNE RIVER SIOUX TRIBE
TELEPHONE AUTHORITY'S AND U S WEST
COMMUNICATIONS, INC.'S JOINT PETITION
FOR EXPEDITED RULING PREEMPTING SOUTH DAKOTA LAW**

Pursuant to sections 4(i), 4(j), and 253 of the Communications Act of 1934 (codified as amended in part at 47 U.S.C. §§ 154(i), 154(j), 253) ("Communications Act"), and pursuant to the Federal Communication Commission's ("Commission") general rules of practice and procedure, 47 C.F.R. §§ 1.1, 1.2, the Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") and U S WEST COMMUNICATIONS, INC. ("U S WEST") jointly petition the Commission for an expedited declaratory ruling preempting enforcement of S.D. CODIFIED LAWS § 49-31-59 ("SDCL § 49-31-59") as applied to Indian tribes or tribal entities. For the reasons set forth herein, the Commission should declare that enforcement of South Dakota's law is preempted by the Communications Act.

I. STATEMENT OF THE CASE AND SUMMARY

The South Dakota law, SDCL § 49-31-59, requiring the South Dakota Public Utilities Commission ("SDPUC") to approve any sale of a telephone exchange within the state of South Dakota, violates the terms, requirements and purposes of the Communications Act as the SDPUC has applied the statute to Indian tribes or tribal entities. The SDPUC's application of

SDCL § 49-31-59 to prevent Indian tribes and tribal entities from entering the telecommunications field falls squarely within the Commission's express authority under 47 U.S.C. § 253(d) to preempt state statutes that prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications service. As discussed below, until the Commission preempts the SDPUC's application of SDCL § 49-31-59, no Indian tribe or Indian tribal governmental entity will ever be able to provide telecommunications services in South Dakota because the SDPUC will always find that the effects of tribal sovereign immunity impair the state's exercise of regulatory jurisdiction and collection of taxes.¹ Therefore, SDCL § 49-31-59 as applied by the SDPUC to Indian tribes and tribal entities constitutes a barrier to entry into the telecommunications field in violation of the Communications Act.

II. BACKGROUND

A. HISTORY LEADING TO THIS PETITION.

The SDPUC's application of state law to prohibit the Telephone Authority from providing telecommunications services in the Morristown, McIntosh and Timber Lake exchanges arises from a procedurally complex set of facts described in detail in Appendix A hereto. In summary, even though U S WEST desires to sell the Morristown, McIntosh and Timber Lake telephone exchanges to the Telephone Authority, the SDPUC has applied state

¹Indeed, the Telephone Authority presently operates five telephone exchanges, Isabel, Dupree, South Dupree, LaPlant, and Eagle Butte, all within the exterior boundaries of the Cheyenne River Indian Reservation, and as such without any regulation or oversight by the SDPUC.

law to prevent the sales' consummation. In the SDPUC's view, the Telephone Authority's sovereign immunity from suit prevents SDPUC taxation and regulation of the Telephone Authority's activities in its ownership and operation of the three exchanges. Because the SDPUC has concluded on two separation occasions -- in the initial administrative proceedings before the SDPUC and again after remand from the South Dakota Circuit Court for reconsideration -- that it cannot tax or regulate the Telephone Authority's activities, it has concluded that the sales of the three exchanges would not be in the public interest.

Sovereign immunity is a fundamental aspect of tribal government. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890-91 (1986) ("Wold II"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). See also Appendix B at B-1 to B-4. Sovereign immunity extends to tribal entities authorized by tribal governments, such as the Telephone Authority. The South Dakota Circuit Court rejected the SDPUC's attempt to base its denial of the telephone exchange sales on the Telephone Authority's refusal to waive its sovereign immunity. *Memorandum Decision* at 28-30, Cheyenne River Sioux Tribe Tel. Auth. v. Public Util. Comm'n of S.D., Civ. No. 95-288 (S.D. Cir. Ct. Feb. 21, 1997) ("Circuit Court Decision") (Attachment 1 hereto). On remand, however, the SDPUC nevertheless focused on the effect of the Telephone Authority's sovereign immunity and applied SDCL § 49-31-59 to prohibit the Telephone Authority from owning and operating the Morristown, McIntosh and Timber Lake exchanges. *Amended Decision and Order Regarding Sale of the Morristown Exchange; Notice of Entry of Order, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc.*

to Certain Telecommunications Companies in South Dakota, No. TC94-122 (Aug. 22, 1997) ("Morristown II Decision") (Attachment 2 hereto); *Amended Decision and Order Regarding Sale of the McIntosh Exchange; Notice of Entry of Order, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, No. TC94-122 (Aug. 22, 1997) ("McIntosh II Decision") (Attachment 3 hereto); *Amended Decision and Order Regarding Sale of the Timber Lake Exchange; Notice of Entry of Order, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, No. TC94-122 (Aug. 22, 1997) ("Timber Lake II Decision") (Attachment 4 hereto). See also Appendix A at A-7 to A-14.

B. THE PARTIES.

The Cheyenne Sioux River Tribe has the power to authorize and establish any organization whose sole purpose or object is to benefit members of the Tribe. CHEYENNE RIVER SIOUX TRIBE CONST. art. IV(p) (Attachment 5 hereto). The Telephone Authority and its subsidiary, Owl River Telephone Inc., are such organizations. Morristown II Decision at 5 (findings of fact 3, 4); McIntosh II Decision at 5 (findings of fact 3, 4); Timber Lake II Decision at 5 (findings of fact 3, 4). The Tribe established the Telephone Authority in 1974 pursuant to the *Duties and Authorities of Cheyenne River Sioux Tribe Telephone Authorities*, Tribal Ordinance No. 24 (Sept. 10, 1974) ("Ordinance 24") (Attachment 6 hereto). Ordinance 24 provides the Telephone Authority with the power to enter into contracts or agreements in all areas of telecommunications, including agreements for the purchases of telephone

exchanges. Id. The Telephone Authority has the power to enter into negotiations with federal, state, and local governments on behalf of the Tribe. CHEYENNE RIVER SIOUX TRIBE CONST. art. IV(a) (Attachment 5 hereto).

It is undisputed that the Telephone Authority has provided telecommunications service to tribal members and non-tribal members residing within its primary service area -- Dewey and Ziebach Counties -- without SDPUC regulation and with few complaints regarding service. In 1958 and again in 1975, despite the SDPUC's inability to regulate or tax the Tribe, the SDPUC did not object to the Tribe's acquisition, via the Telephone Authority, of the Dupree and Isabel exchanges. Transcript of April 17, 1995 hearing at 119 ("April TR") (Attachment 7 hereto). The Telephone Authority has served the towns of Eagle Butte, Dupree, Isabel, and La Plant for the past 21 years. Id. The Telephone Authority provides high quality telephone service to 2,700 access lines with fiberoptic long distance service, computerized billing service, mobile telephone system, equal access conversion, free fire bar service, and 100 percent one-party service in buried cable.

On December 11, 1997, the SDPUC determined that the Telephone Authority satisfied the criteria necessary for designation as an eligible telecommunications carrier ("ETC") pursuant to the Commission's regulations, thereby agreeing with the determination of the Cheyenne River Sioux Tribal Council that the Telephone Authority is an ETC for its service area. Cheyenne River Sioux Tribe Resolution No. 337-97-CR (Nov. 5, 1997) (Attachment 8 hereto); *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, In the Matter of the Filing by Cheyenne River Sioux Tribe Telephone Authority for Designation as*

an Eligible Telecommunications Carrier, No. TC97-184 (Dec. 17, 1997) (Attachment 9 hereto). Thus, the SDPUC agreed that the Telephone Authority provides services similar to other, non-tribal telecommunications providers in South Dakota.²

The telephone exchange sales to the Telephone Authority will not adversely affect the quality of service or service rates in the exchanges. Upon approval of the sale, the Telephone Authority has agreed to add three full-time positions: a combination technician to be located in Morristown, a trencher to be placed in either Morristown or Timber Lake, and a billing clerk to be located in Eagle Butte, in addition to the 22 existing employees to service customers within the three exchanges. The Telephone Authority's feasibility study, conducted by independent accountants, indicated that the cost of coordinating and upgrading equipment will not effect local rates in the acquired exchanges. The Telephone Authority intends to charge the same local rates as U S WEST does in McIntosh, Morristown, and Timber Lake. It is undisputed that the Telephone Authority has had only one rate increase in ten years. The Telephone Authority has been committed to working with the communities within the proposed purchase exchanges to insure that telephone services needed to attract new business and to keep existing businesses are available at competitive rates. The Telephone Authority provides

²In its petition to the SDPUC for ETC designation, the Telephone Authority expressly stated its position that the SDPUC does not have jurisdiction to implement the Communications Act within Reservation boundaries. After enactment of the technical correction to § 214(e) of the Communications Act, Pub. L. No. 105-125, 111 Stat. 2540 (1997) (codified as 47 U.S.C. § 214 (e) (6)), the Telephone Authority also sought ETC designation from the Commission consistent with the Telephone Authority's position that the SDPUC does not have jurisdiction within Reservation boundaries. *See In the Matter of Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419* (filed Jan 16, 1998).

public safety services which include free fire bar service. Pursuant to agreements with Dewey and Ziebach Counties, the Telephone Authority provides 911 and enhanced 911 services to its customers.

It is undisputed that the Telephone Authority is willing and able, financially and otherwise, to purchase, operate, maintain, and upgrade facilities of the three telephone exchanges at issue in this case. It is uncontested that the Telephone Authority has the ability to obtain capital, has incentives to invest in the acquired exchanges and has financial commitments to cover the acquisition costs and any equipment necessary to upgrade the purchased exchanges. The Telephone Authority has demonstrated that it has the ability to provide distance learning through interactive video services, tele-medicine, and state of the art telecommunications services to the purchased exchanges. It was uncontested at all of the hearings before the SDPUC that the purchase of the exchanges by the Telephone Authority would enhance the local economy.

U S WEST is a Colorado corporation providing local exchange telecommunications service, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota. *Morristown II Decision* at 5 (finding of fact 1); *McIntosh II Decision* at 5 (finding of fact 1); *Timber Lake II Decision* at 5 (finding of fact 1). U S WEST's study area includes the three exchanges at issue here.

C. EXCHANGES TO BE SOLD.

The Timber Lake exchange is located within the boundaries of the Cheyenne River Indian Reservation and the Standing Rock Indian Reservation. The *Morristown* and *McIntosh*

exchanges are located within the boundaries of the Standing Rock Indian Reservation.

**III. SOUTH DAKOTA LAW VIOLATES THE
TELECOMMUNICATIONS ACT BY
ERECTING A BARRIER TO ENTRY FOR
ALL TRIBAL ENTITIES SEEKING TO OWN
AND OPERATE TELEPHONE EXCHANGES
IN SOUTH DAKOTA**

A. PREEMPTION OF STATE LAW UNDER TELECOMMUNICATIONS ACT OF 1996.

The Communications Act adopts a new policy of unconditionally removing all legal and economic impediments to the provision of competitive local exchange services at the earliest time possible. "Through the 1996 Act, Congress sought to establish 'a pro-competitive, deregulatory national policy framework' for the United States telecommunications industry."

In the Matter of New England Public Communications Council, 11 F.C.C.R. 19713 ¶ 9

(1996) (quoting S. CONF. REP. No. 104-230 at 1 (1996)). The Commission itself states that,

"[t]he goal of this new law is to let anyone enter any communications business -- to let any communications business compete in any market against any other." Federal Communications Commission, *Telecommunications Act of 1996* at 1 (visited Aug. 19, 1997)

< <http://www.fcc.gov/telecom.html> > .

To achieve this goal, § 253 of the 1996 Act invalidates state law barriers to local competition: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). In the event the Commission determines that a state law constitutes a barrier to entry, the Communications Act requires

preemption of such state law:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d). See New England Public Communications Council, 11 F.C.C.R. 19713

¶ 9. The Constitution permits Congress to preempt state law. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368 (1985) (citing U.S. CONST. art. VI). Section 253 constitutes congressional preemption of state law where such state law is a barrier to open competition in the telecommunications service field.

Under the Communications Act,

the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets." Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well." Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.

In the Matter of Classic Telephone, Inc., 11 F.C.C.R. 13082 ¶ 25 (1996). Section 253, then, is part of Congress' scheme to deregulate the telecommunications field and permit market forces to determine the provision of telecommunications services. Even though the Telephone

Authority was the successful bidder for the Morristown, McIntosh and Timber Lake exchanges, as determined by market forces, see Appendix A at A-1, the SDPUC sought to impose its regulatory scheme in contravention of such market forces and deny the sales. Just as "the manner in which the Cities implemented their franchise requirements, as reflected in their decisions denying Classic's franchise requests, prohibits Classic from providing interstate and intrastate telecommunications services . . . ," *id.* ¶ 26, so do the SDPUC's decisions denying the Morristown, McIntosh and Timber Lake exchange sales prohibit the Telephone Authority from providing interstate and intrastate telecommunications services. As such, the SDPUC's application of SDCL § 49-31-59 constitutes a barrier to entry which the Commission should preempt under 47 U.S.C. § 253(d).

B. SOUTH DAKOTA'S LAW DOES NOT FALL WITHIN THE PROTECTED CLASS OF STATE REGULATION UNDER § 253(b).

Section 253(b) of the Communications Act provides that the statute does not affect "the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The SDPUC's application of SDCL § 49-31-59 is not "competitively neutral" nor does it "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [or] safeguard the rights of consumers." Instead, the statute as applied by the SDPUC discriminates against Indian tribes and tribal entities seeking to provide telecommunications services in South

Dakota.³

In In the Matter of New England Public Communications Council, 11 F.C.C.R. 19713 (1996), the issue before the Commission was whether the Connecticut Department of Public Utilities Control's ("DPUC") prohibition on competitive provision of pay phone services should be preempted under § 253(d). The DPUC allowed only "incumbent local exchange carriers (LECs) and certified LECs," *id.* ¶ 1, to provide pay telephone services in the state. In other words, those seeking to provide telecommunications services that were not LECs could not provide pay telephone services. The Commission found that the DPUC rule was not "competitively neutral" on its face because it barred new and uncertified telecommunications service providers from providing a telecommunications service in a competitive environment as required by the Communications Act. *Id.* ¶¶ 17, 18, 20. Therefore, the DPUC prohibition was a barrier to entry within the meaning of § 253(a). *Id.* ¶ 18. The Commission concluded that the DPUC prohibition "violates section 253(a) of the Communications Act . . . and therefore is preempted." *Id.* ¶ 16.

In reaching its decision, the Commission examined whether the DPUC prohibition fell within "the protected class of state regulation described in section 253(b)." *Id.* The DPUC could not demonstrate that its prohibition was "'necessary' to 'safeguard the rights of

³Of the 67 telephone exchanges U S WEST offered to sell, Appendix A at A-1, the SDPUC only denied four sales, three of which were Morristown, McIntosh and Timber Lake exchanges. The fourth was the Alcester exchange sale. The SDPUC denied the sale because a municipal telephone company from Beresford sought to purchase the Alcester exchange, which was not within the Beresford municipal limits, and therefore would have violated state law requiring that municipal telephone companies operate telephone exchanges only within their respective municipalities.

consumers' or to 'protect the public safety or welfare.'" *Id.* ¶ 21 (quoting 47 U.S.C. § 253(b)). The Commission refused to interpret the term "necessary" so broadly as to allow it to overcome "the general rule prohibiting barriers to entry" *Id.* ¶ 25. Nor could the Commission find anything in the DPUC prohibition that could override congressional intent that telecommunications services be provided on a competitive basis. In short, because Connecticut's rule excluded "an entire class of potential competitors" from providing a telecommunications service, *id.* ¶ 22, the Commission preempted that rule.

Like the Connecticut rule, the SDPUC's application of the South Dakota statute also excludes "an entire class of potential competitors" from providing telecommunications services in South Dakota. In its second round of decisions, the SDPUC held that approval of the sale of the Morristown, McIntosh and Timber Lake telephone exchanges was not in the public interest because the SDPUC could not ensure that the Telephone Authority would provide the same kind and quality of services that U S WEST currently provides in those exchanges. Morristown II Decision at 7 (finding of fact 20); McIntosh II Decision at 7 (finding of fact 20); Timber Lake II Decision at 7 (finding of fact 20). The Commission already has rejected this same argument:

The DPUC contends that limiting the class permitted to provide payphone services to incumbent LECs and certified LECs will protect the public welfare and consumers' rights because LECs are subject to certification requirements and service standards. It fails, however, to explain how the application of certification requirements and service standards to LECs, but not to independent payphone providers, achieves this goal. . . . In addition, the DPUC fails to address how requiring a carrier to be a LEC in one part of Connecticut will ensure its provision of quality payphone services in another part of the state. While the

DPUC faults the economic structure of the COCOT industry for the abusive practices of independent payphone providers, it fails to demonstrate how this structure is any different for LECs that provide payphone services outside their local exchanges.

New England Public Communications Council, 11 F.C.C.R. 19713 ¶ 23 (footnotes omitted).

Thus, the SDPUC's attempt to couch its refusal to approve the sale of the Morristown, McIntosh and Timber Lake telephone exchanges to the Telephone Authority in terms of protecting the public interest nevertheless runs afoul of the Communications Act's prohibition against barriers to entry. Like the Connecticut prohibition on competitive provision of payphone services, the SDPUC's application of SDCL § 49-31-59 to prevent the Telephone Authority from owning and operating the three exchanges cannot pass § 253 muster.

C. THE SDPUC'S APPLICATION OF SDCL § 49-31-59 VIOLATES FEDERAL LAW.

In addition to violating the letter and spirit of the Communications Act, the SDPUC's application of state law also violates federal law promoting tribal sovereignty and self-government. Appendix B is a detailed discussion of those federal laws, and describes the fallacy of the SDPUC's conclusion that the telephone exchange sales to the Telephone Authority are not in the public interest.

The Commission should preempt the SDPUC's application of SDCL § 49-31-59 as a barrier to entry: it precludes the Telephone Authority from purchasing the three telephone exchanges because the Cheyenne River Sioux Tribe did not relinquish its tribal sovereignty -- a fundamental characteristic of Indian tribal government long protected by federal law.

Appendix B at B-4 to B-9. Under well-established federal law, the SDPUC may not apply

state law so as to prohibit the Telephone Authority from purchasing the Timber Lake, Morristown and McIntosh telephone exchanges solely because of the characteristics which the Telephone Authority enjoys as a tribal entity under federal law. *Id.* To be sure, the South Dakota Circuit Court ruled that the SDPUC has jurisdiction over the sale of the three exchanges. Circuit Court Decision at 16-24.⁴ But even assuming that the SDPUC has jurisdiction over the sales, the application of state law -- as opposed to state jurisdiction -- is preempted to the extent that such law interferes with federal Indian policy. Appendix B at B-4 to B-9. Because all Indian tribes and tribal entities possess the same characteristics, the Commission should preempt SDPUC's application of SDCL § 49-31-59 as a barrier to entry to all Indian tribes and tribal entities seeking to provide telecommunications services in South Dakota.

With regard to the SDPUC's grounding its decision on its inability to regulate the Telephone Authority's provision of telephone service within Indian Country, see Appendix A at A-4 to A-7, A-10 to A-11, not only is the Telephone Authority accountable to maintain quality in a political sense directly to its subscribers who are tribal members and indirectly to all others but, as the SDPUC observed its findings of fact, the Telephone Authority has a proven track record of good service. Morristown II Decision at 7-8 (findings of fact 20-22, 24); McIntosh II Decision at 7-8 (findings of fact 20-22, 24); Timber Lake II Decision at 7-8 (findings of fact 20-22, 24). Additionally, the Telephone Authority has sought by proposed agreements and by its commitments which are on the record to respond to every perceived concern of the SDPUC short

⁴US WEST and the Telephone Authority have appealed that holding.

of relinquishing those characteristics which are essential to tribal sovereignty and self-government and which for more than two hundred years have been the focus of federal protections and attention. Given the goal of the Communications Act to encourage competition at the local exchange level, if the Telephone Authority is not offering competitive services, there will be new entrants into these markets. In other words, the discipline of the marketplace will work on the Cheyenne River and the Standing Rock Indian Reservations just as it works elsewhere.

The Telephone Authority would have meaningful opportunities and alternatives for expanding its telephone business into the areas of the Cheyenne River Sioux Tribe's and the Standing Rock Sioux Tribe's reservations in which the three telephone exchanges lie but for the SDPUC's application of state law in contravention of the Communications Act. The Telephone Authority then would be able to expand its market as a facilities based provider of local telephone service. One of the principal advantages of being a facilities based provider of local telephone service (as opposed to a reseller), of course, is the ability to sell services in a wholesale environment to other carriers. See S.D. ADMIN. R. 20:10:27:02. However, under the SDPUC's scheme, the Telephone Authority would be relegated to constructing a redundant infrastructure if it wished to enter the three markets or exchanges in question as a facilities based provider. In this rural setting, the necessity for the Telephone Authority to overbuild these networks seems neither economically reasonable nor even fair given the available U S WEST networks.⁵

⁵ The Circuit Court noted, "[f]urthermore, counsel have not briefed, argued or identified any record evidence of other practical difficulties CRSTTA may have in providing local service without the purchase of these exchanges." Circuit Court Decision at 21 n.13. Since the record in

The other choice seemingly available would be that of purchasing service at wholesale from U S WEST and reselling it at retail in competition with U S WEST. Even though the resale of service is limited by the capabilities of U S WEST's network,⁶ nevertheless the resale business would offer subscribers in the three exchanges the benefits of competition particularly in pricing and service. However, under the SDPUC's scheme, the viability of this alternative form of entry by reselling service is questionable. The Communications Act authorizes state utility commissions to regulate the sale of service from the facilities based provider to the reseller. See 47 U.S.C. §§ 252(e), 253. If the SDPUC can approve or disapprove the purchase of telephone exchanges depending on whether an Indian tribe or tribal entity has relinquished tribal sovereignty and political integrity, then the SDPUC could use the same criteria when approving the purchase for resale of telephone service by the Tribe from US WEST. In other words, under the SDPUC's scheme the Telephone Authority, having no opportunity for entry by purchase and resale, is left with the choice of deciding whether to construct its own redundant infrastructure as a facilities based provider -- an economically questionable, if not foolhardy undertaking.

the sales proceedings was closed before passage of the of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, and since the local telephone business was monopolistic before the passage of that Act, it would not have been possible for the Telephone Authority and U S WEST to present testimony or other evidence before closure of the record regarding the viability of an entry by the Telephone Authority into the market as a telephone service provider in competition with U S WEST. In fact, the SDPUC refused to reopen the record for testimony or other evidence on any issue.

⁶ U S WEST would need only provide to the Telephone Authority services equal in quality to those which it currently provides. 47 U.S.C. § 251(c)(2)(C). See also Iowa Utilities Board v. FCC, 120 F.3d 753, 812-813 (8th Cir. 1997).

The SDPUC denied the joint application for approval of the sale of the Morristown, McIntosh and Timber Lake telephone exchanges to the Telephone Authority because the Cheyenne River Sioux Tribe had not relinquished the integrity of its tribal political processes and its immunity to the SDPUC 's regulatory and state and local taxing authority. The SDPUC's scheme for implementing SDCL § 49-31-59 violates federal law as applied in Wold II, see Appendix B at B4-B9, and as set forth in the Communications Act.

IV. CONCLUSION

The SDPUC's application of state law so as to prohibit the Telephone Authority from providing telecommunications services in South Dakota violates the Communications Act as a barrier to entry into the telecommunications services field. Accordingly, U S WEST and the Telephone Authority respectfully request that the Commission preempt the SDPUC's application of SDCL § 49-31-59.

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APPENDIX A

Below, U S WEST and the Telephone Authority describe the history of the various proceedings leading to the instant petition for preemption of the SDPUC's application of state law.

A. SDPUC ROUND ONE.

In early 1994, U S WEST offered 67 telephone exchanges for sale in South Dakota as a group sale with one bid for the entire group. U S WEST never offered individual exchanges for sale to individual telecommunications companies as part of the sale. Individual telecommunications companies, including the Telephone Authority, formed a consortium to respond to U S WEST's offer and developed the Independent Community Acquisition Agreement ("ICAA") to control and manage the sale process. The ICAA group specifically requested U S WEST to add certain exchanges to the group being sold and U S WEST did so. U S WEST provided, after execution of appropriate confidentiality agreements, a confidential offering memorandum detailing the factual background necessary to allow the ICAA companies to determine their interests. The ICAA companies investigated and researched the information provided by U S WEST to make their determinations as to the value of the properties being sold. The ICAA members then held a sealed bid auction in June of 1994 under the specific rules and procedures set out in the ICAA. As a result of the competitive bidding processes, the Telephone Authority was the successful bidder on the Morristown, Timber Lake, and Nisland exchanges.

U S WEST rejected the initial bid of the ICAA. The ICAA regrouped and individual bidders collectively raised their cumulative bids to meet U S WEST's purchase price. U S WEST

accepted the second bid and the buyers and seller negotiated a form of a definitive purchase agreement. Subsequently, on December 7, 1994, all purchasing companies, including the Telephone Authority, executed definitive purchase agreements with U S WEST.

On December 20, 1994, U S WEST and 20 telecommunication companies, one of which was the Telephone Authority, filed a joint application requesting that the SDPUC approve the sale by U S WEST of 67 local telecommunication exchanges to the buyers or their affiliates. *Morristown II Decision at 1,5 (finding of fact 2); McIntosh II Decision at 1,5 (finding of fact 2); Timber Lake II Decision at 1,5 (finding of fact 2).*⁷ The joint application was part of a larger agreement under which U S WEST accepted one total bid package for the sale of 67 exchanges.

The joint application sought a declaration that the sale and transfer did not require SDPUC approval or, alternatively, that the SDPUC knew of no reason why the sale and transfer should not occur. *Morristown II Decision at 1; McIntosh II Decision at 1; Timber Lake II Decision at 1.* In support of the request for a declaration that the sale did not require SDPUC approval, the parties attached to the application a letter from the SDPUC's then General Counsel, Doug Eidahl, which indicated that the SDPUC did not have jurisdiction to regulate the acquisition of local exchange companies. Indeed, it is undisputed that there is no local competition in the *Morristown, McIntosh or Timber Lake telephone exchanges. Morristown II Decision at 6*

⁷As discussed herein, the SDPUC entered two separate sets of decisions. *See Part B, infra.* In issuing the second set of decisions after remand from the South Dakota Circuit Court, the SDPUC merely amended its first set of decisions in attempted compliance with the Circuit Court's order, and left in place those portions of the first set of decisions with which the Circuit Court found no problems. Accordingly, we refer to the second round of decisions -- *Morristown II Decision, McIntosh II Decision, and Timber Lake II Decision* -- wherever possible in order to recount the most recent SDPUC pronouncement.